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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 734

ESTATE OF MERVIN G. PIERPONT, DECEASED,
UNION TRUST COMPANY OF MARYLAND
AND ERNEST L. POYNER, EXECUTORS,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Daily Record Co., Baltimore 3, Md.

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Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on ~~October~~ SEPTEMBER 4, 1964.

CITATIONS TO OPINIONS BELOW

The Memorandum Findings of Fact and Opinion of the Tax Court of the United States, filed November 30, 1962 and printed in Appendix B hereto, *infra*, p. 10a is unreported. The Order of the Tax Court of the United States, filed February 6, 1963 and printed in Appendix B hereto, *infra*, p. 24a, revising the Memorandum Opinion and Findings of Fact of the Tax Court, is unreported. The opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, p. 26a, is reported in 336 F. 2d 277.

JURISDICTION

The Judgment of the Court of Appeals was entered on ~~October~~ September 4, 1964 (Appendix B, p. 38a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Prior decisions of this Court have established that legal rights and interests are created by state law, and that the Federal Revenue Acts are concerned only with the imposition of taxes on the rights and interests as so created, no matter what name may be given thereto by state law.

The questions presented are:

1. Whether a final, unappealed judgment by a *nisi prius* State court, which was entered in a regularly instituted and prosecuted adversary, although actually non-contested, proceeding for the construction of a will and which determined that the widow of a decedent had the power to appoint by will to her estate all or any part of the corpus of a trust estate, constituted a final and binding decision is to the nature and extent of such power of appointment under the law of Maryland for the purpose of determining the imposition of the Federal Estate Taxes in respect of the property subject to such power of appointment.
2. Whether a federal court has the right, in a Federal Estate Tax case involving the nature and extent of a power of appointment under state law, to review and reverse a final, unappealed judgment as to the nature and extent of such power under state law which was rendered by a *nisi prius* state court in a regularly instituted and prosecuted adversary, although non-contested, proceeding over which the state court had jurisdiction.

STATUTES INVOLVED

The statutes involved (set forth in Appendix A, *infra*) are Sections 2001 and 2056 of the Internal Revenue Code of 1954, 68A Stat. 373 and 392, 26 U.S.C. Sections 2001 and 2056.

STATEMENT OF THE CASE

Petitioners, Union Trust Company of Maryland and Ernest L. Poyner (the "Executors"), are the Executors of the Estate of Mervin G. Pierpont (the "Decedent"), Deceased, late of Baltimore City, Maryland, who died on January 31, 1956 survived by his wife, Lallah R. Pierpont ("Lallah") (R. 2, 26).*

The Decedent created two trust estates by Items Sixth and Seventh of his Last Will and Testament (the "Will"), which was executed by him on January 10, 1951 (R. 2, 5). Union Trust Company of Maryland (the "Trustee") was the Trustee of both trust estates (R. 2, 5). The trust created by Item Sixth of the Will was designated as the "Lallah R. Pierpont Trust", and the trust created by Item Seventh was designated as the "Residuary Trust" (R. 2, 5).

All of the income of the Lallah R. Pierpont Trust is payable to Lallah quarterly during her lifetime (R. 3). The Trustee is further directed to make certain mandatory payments to Lallah out of principal, which are measured in part by the income accumulated in the Residuary Trust, and is also authorized to make discretionary payments from principal to Lallah (R. 3). Under Paragraph (e) of Item Sixth of the Will, the Lallah R. Pierpont Trust will terminate and:

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* As used in this Petition, "R" refers to the appendix record below (Vol. 1 of the Transcript of Record certified to this Court).

(1) "the entire remaining principal of the Lallah R. Pierpont Trust, or such portion thereof as may be validly appointed, (is to) be paid over free of this Trust in such manner and proportions as (Lallah) may designate and appoint in her Last Will and Testament"; and

(2) Any part of the principal of the Lallah R. Pierpont Trust as to which Lallah fails to exercise a valid power of appointment is to be distributed to the Trustee of the Residuary Trust for retention and/or distribution as a part of the Residuary Trust (R. 4-5).

Under Item Seventh of the Will, the income of the Residuary Trust is accumulated until the earlier of the death or remarriage of Lallah or the final payment of benefits to her from the Lallah R. Pierpont Trust, after which time:

(1) The Trustee is directed to make certain payments from income and principal to Lallah until her death or remarriage, after which

(2) The income is payable to William M. Pierpont (the "son") until his death or until he has withdrawn the entire principal of the Residuary Trust (R. 5).

The son is given an absolute power of withdrawal after the death or remarriage of Lallah, together with a power to appoint by will to his spouse and/or descendants (R. 6). The Residuary Trust terminates upon the later of the death of the son or the death or remarriage of Lallah, at which time any remaining principal which has not been appointed by the son will be paid to his descendants, if any, and otherwise to a designated charity.

The Executors filed the estate tax return of the Decedent on April 29, 1957 (R. 26). This return showed a gross

estate of $362,519.84, a net taxable estate of $111,986.16 and an estate tax liability of $23,538.36, which was paid when the return was filed (R. 26). On January 14, 1960 the Respondent issued his statutory notice of a proposed deficiency of $33,542.48 in estate taxes, resulting from several proposed adjustments, of which the only one significant to the present proceeding[1] was the proposed disallowance of the value of the property bequeathed to the Trustee by Item Sixth of the Will as a deduction pursuant to Section 2056 of the Internal Revenue Code in computing the taxable estate (R. 26-27). Thereafter the Executors filed a petition in the Tax Court of the United States seeking a redetermination of such proposed deficiency pursuant to Section 6213 of the Internal Revenue Code of 1954, 26 U.S.C. Section 6213. The Tax Court of the United States entered a decision determining a deficiency in estate tax in the amount of $31,697.63, and the Executors petitioned the Circuit Court of Appeals for the Fourth Circuit to review such decisions pursuant to Section 7482 of the Internal Revenue Code of 1954, 26 U.S.C. Section 7482. Thereafter the Court of Appeals entered judgment affirming the decision of the Tax Court.

Both the Tax Court of the United States and the Court of Appeals for the Fourth Circuit found that the bequest to the Trustee under Item Sixth of the Will met all requirements for deductibility under Section 2056 of the Internal Revenue Code of 1954 except for an asserted failure to meet the requirement that Lallah, as the surviving spouse, had the power to appoint the entire interest in favor of her estate (App. B, pp. 19a and 27a). Consequently, the sole disputed issue before both courts was whether Lallah had this power. Both courts below held that this

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[1] All other proposed or claimed adjustments have been settled by agreement.

question had to be decided under Maryland law (App. B, pp. 20a and 31a).

On October 28, 1958, after the estate tax return was filed but before the notice of the proposed deficiency was issued and the proceedings were commenced in the Tax Court of the United States, Lallah, the Trustee and the Executors brought suit in the Circuit Court of Baltimore City under the Uniform Declaratory Judgment Act (Md. Anno. Code (1957) Art. 31A) against the son, his wife and descendants (including unborn descendants) and the ultimate charitable remainderman, praying that the court construe the Will and declare the rights of Lallah under the power of appointment granted to her by Item Sixth (R. 7-8, 29-30, 32-41). All persons named as defendants were duly summoned and upon failure of a legal guardian to appear for the infant defendants and the unborn descendants a Deputy Clerk of the Court was appointed as guardian *ad litem* to represent them (R. 8, 79). The guardian filed a formal answer on a form supplied by the Court (R. 75, 79). Upon failure of the other defendants to appear the Circuit Court of Baltimore City passed a decree *pro confesso* against the defendants and referred the matter to a master-examiner to take testimony (R. 8). Subsequently, the charitable contingent remainderman filed an answer agreeing that the state court might grant the relief prayed (R. 8). Testimony was taken on two occasions and counsel for the petitioners in the state court proceedings submitted a memorandum of facts and authorities which was adopted verbatim by the master-examiner as a part of his report (R. 9). Subsequently, the master-examiner requested counsel for the petitioners to submit an appropriate decree (R. 74). The master-examiner agreed with and adopted the proposed decree as so submitted with a technical change (R. 74-75). The decree, as entered by the Circuit

Court of Baltimore City on April 3, 1961, expressly declared that "Lallah * * * has the power * * * to appoint all or any part of the corpus of the trust estate * * * to her estate * * *" (R. 53). The time for taking an appeal expired on May 3, 1961, without an appeal having been taken (R. 10)

Although the master-examiner did not make any independent examination of the authorities, it was his definite opinion, based on the Will and the testimony, that the Will gave Lallah a broad power of appointment to appoint to her estate or anyone (R. 74, 76-78). He testified explicitly that if this had not been his opinion he would not have signed the report (R. 78).

The Executors contended before both the Tax Court of the United States and the Court of Appeals for the Fourth Circuit that under Maryland law Lallah had a power to appoint the principal of the Lallah R. Pierpont Trust to her estate, and that the decree of the Circuit Court of Baltimore City to that effect constituted a binding determination of this question. Each of these courts held that under its interpretation of the Maryland law the power which was granted to Lallah was not sufficiently broad to include a power to appoint to her estate, and that the contrary decision of the Circuit Court of Baltimore City was not binding on it.

The stated reasons of the Tax Court for its conclusion that the decree of the Circuit Court of Baltimore City was not binding on it were that:

(1) The proceeding was non-adversary;

(2) The petition was uncontested;

(3) The only apparent purpose of the petition was to obtain a tax advantage;

(4) In effect the decree was a consent decree; and

(5) The decree did not represent the "deliberate conclusion" of the court[2] (App. B, p. 21a).

The stated reason of the Court of Appeals for holding that the decree was not binding is that it was collusive in the sense that "all of the parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional * * * tax", because of:

(1) The non-adversary character of the proceedings;

(2) The failure of the master-examiner to make any independent examination of the Maryland law; and

(3) The failure of the Circuit Court for Baltimore City to do any more than rubber stamp the master-examiner's report (App. B, p. 32a).

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals has decided an important question of federal law in conflict with applicable decisions of this Court.

B. The decision of the Court of Appeals as to the effect required to be given to the decree of the state court is in conflict with the decision of the Court of Appeals for the Third Circuit in *Gallagher v. Smith*, 223 F. 2d 218 (Cir. 3, 1955).

The present case involves an important area of the relationship between federal and state courts. This Court

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[2] In the original Memorandum Opinion the Tax Court also erroneously stated that (a) the decree did not determine present property rights or the extent of any interest which would be binding on the beneficiaries regardless of the outcome of the federal court case and (b) the decree did not expressly declare that Lallah had the power to appoint to her estate. This part of the Memorandum Opinion was stricken by the order on the rehearing.

held in *Morgan v. Commissioner*, 309 U.S. 78, 80 (1940) that:

> "State law creates legal interest and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed."

Although *Morgan* did not involve the question as to how state law was to be determined in particular situations, this court had previously held in *Freuler v. Helvering*, 291 U.S. 35 (1934), that an order by a California *nisi prius* court determining that a trustee was required to deduct depreciation in computing distributable income was binding for the purpose of determining the amount of distributable income which was taxable to the beneficiaries, notwithstanding that the state court proceedings were commenced while the income tax case was pending and after the gross amount of income has been distributed, expressly stating, 291 U.S. at 45:

> "Moreover, the decision of that court, until reversed or overruled, establishes the law of California respecting distribution of the trust estate. It is nonetheless a declaration of the law of the state because not based on a statute, or earlier decisions. The rights of the beneficiaries are property rights and the court has adjudicated them. What the law as announced by that court adjudges distributable is, we think, to be so considered in applying Section 219 of the Act of 1921."

Freuler involved Section 219 of the Revenue Act of 1921 (Ch. 136, Sec. 219; 42 Stat. 146), which expressly provided that there should be included in the net income of a beneficiary "that part of the income of the * * * trust * * * which, pursuant to the * * * order governing the distribution, is distributable to such beneficiary * * *." Consequently, some doubt could exist as to whether this Court's decision in *Freuler* was applicable to other situations in which inferior state courts had construed particular trusts.

These doubts were laid at rest by the decision of this Court in *Blair v. Commissioner*, 300 U.S. 5 (1937), rev'g *Commissioner v. Blair*, 83 F. 2d 655 (Cir. 7, 1936).

Blair involved the dual question of whether an income beneficiary could, as matter of state law, make assignments of his interest and whether such assignments, if valid under state law, were effective for the purpose of making the income taxable to the assignees. The Court of Appeals for the Seventh Circuit had held, *Commissioner v. Blair*, 60 F. 2d 340 (Cir. 7, 1932), that the assignments were not valid with respect to 1923 income *as a matter of state law*. Thereafter, during the pendency of proceedings before the Board of Tax Appeals with respect to income for years subsequent to 1923, the trustees instituted a proceeding against the assignor and the assignees for a construction of the instrument, and the Illinois Appellate Court held in *Blair, et al. v. Linn, et al.*, 273 Ill. App. 23 (Ill. App. Ct. 1st Dist., 1st Div. 1934), that the assignments were valid under state law.

The Illinois statute which was then in effect (Smith-Hurd Illinois Statutes (Perm. Ed.), Ch. 37, Sec. 41; Laws 1885, p. 65 Sec. 1, enacted June 27, 1885), provided that opinions of the Appellate Court "Shall not be of binding authority in any cause or proceeding, other than that in which they may be filed", and this Court had held in *Graham v. White-Phillips Co., Inc.*, 296 U.S. 27 (1935), aff'g 74 F. 2d 417 (Cir. 7, 1934), that decisions by the Illinois Appellate Courts did not constitute binding determinations of Illinois law. Nevertheless, the Board of Tax Appeals held that the decision of the Illinois Appellate Court was binding on it. *Blair v. Commissioner*, 31 B.T.A. 1192 (1935). This part of the Board of Tax Appeals opinion was approved by the Court of Appeals for the Seventh Circuit, after discussing this Court's decision in *Freuler, supra*, and *Graham*

v. White-Phillips Co., Inc., supra, and the above cited statute, with the statement, 83 F. 2d at 657:

> "Although there are these distinctions between the Freuler case and the instant one, we accept it as authority for holding that a final decree of a state court, supreme or inferior, entered in a specific matter such as the interpretation of rights under a testamentary trust, is binding upon a Federal Court in determining the character of a trust, the income from which is the subject of a Federal tax."

The Court of Appeals then went on to hold that the assignor was taxable on the income of the trust.

This Court reversed the Court of Appeals as to the question of taxability of the income, but expressly approved so much of the decision of the Court of Appeals as held the decision of the Illinois Appellate Court with respect to the validity of the assignments to be binding, stating, 300 U.S. at 10:

> "The decision of the state court upon these questions is final (Citations). It matters not that the decision was by an intermediate appellate court."

It is therefore respectfully submitted that insofar as the decision of the Court of Appeals is premised on the proposition that a determination by an inferior state court of property rights which are sought to be taxed is merely evidentiary of the state law and subject to being accepted or rejected by a federal court, such decision is erroneous and contrary to the decisions of this Court in *Freuler* and *Blair*, *supra*.

The only qualification which has been placed by this Court on the scope of the doctrine established by *Freuler* and *Blair* is, by implication, that the proceeding in the state court must not be "collusive in the sense that all the parties joined in a submission of the issues and sought a

decision which would adversely affect the Government's right to additional * * * tax." *Freuler v. Helvering, supra,* 291 U.S. at 45. However, neither opinion articulates the basis for determining what is a collusive proceeding otherwise than by detailing the circumstances which this Court held to show that the particular proceedings in those cases were not collusive in the sense used in the opinions.

The circumstances which were recited by this Court in *Freuler* as showing that the state court proceeding was not collusive were that the case was instituted by filing a trustee's account, in the usual way, notice was given to the interested parties, objections to the account were presented, the matter was heard in the regular course, with all parties being represented by counsel, the decree purported to decide issues regularly submitted and not to be a consent decree and the court ruled against the remaindermen on one point and in their favor on another.

The circumstances which were recited by this Court in *Blair* were that the trustees were entitled to seek instructions of the court having jurisdiction over the trust, that court entertained the suit, and the appellate court, with the first decision of the Circuit Court of Appeals before it, reviewed the decisions of the Supreme Court of the State and reached a deliberate conclusion.[3]

The state court proceeding in the present case was instituted by the Executors, the Trustee and Lallah against all other parties who were or could be beneficially interested in the Residuary Trust, seeking a construction of the

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[3] Although it does not appear from this Court's opinion in *Blair*, answers were filed in the state court proceedings and all parties were represented by counsel before the Illinois Appellate Court. However, it is significant that the Court of Appeals regarded the decree as being substantially a consent decree, and held that such a decree was nevertheless binding in the absence of a showing of collusion or fraud on the court. 83 F. 2d at 657.

Will. All parties were duly summoned, although none actively contested. Testimony was taken, and a memorandum of facts and law was submitted to the master-examiner. Although he did not make any independent examination of the cases, he was of the opinion, based on his examination of the Will, that Lallah had a broad power of appointment to "appoint to anyone, her estate or anyone", and if he had not been of that opinion he would not have signed the report[4] (R. 76, 78). Having reached that conclusion, the master-examiner requested the counsel for the petitioners to submit a proposed decree, which he then submitted to the state court. The decree as entered by the state court finally determined as between the parties the power of Lallah to exercise the power of appointment in favor of her estate.

It is respectfully submitted that the state court proceeding in the present case is identical, in its legal nature, with the proceeding in *Blair, et al. v. Linn, et al., supra,* in that each involved a proceeding for the construction of a will and each resulted in a decree establishing the rights of the beneficiaries under the will.

The Circuit Court of Appeals nevertheless held that the following asserted circumstances made this decree collusive within the intendment of *Freuler:*

1. The non-adversary character of the proceedings;
2. The failure of the master-examiner to make an independent inquiry of the Maryland law; and
3. The failure of the court to do any more than rubber stamp the master-examiner's report.

It is respectfully submitted that the statement by the Circuit Court of Appeals as to the first circumstance is

[4] This is also the opinion which is expressed by Judge Bryan in his dissent. See Appendix B, *infra,* p. 37a.

clearly erroneous, since it is apparent from the record that the state court was an adversary proceeding for the construction of the Will. While the state court proceeding was not contested, this does not convert it into an *"ex parte"* proceeding or in any way make the decree a "consent decree". It is further submitted that the remaining two circumstances do not, either standing alone or coupled with an absence of defense, constitute grounds for holding that the state court case was "collusive".

The petitioners in the state court all had legitimate interests to serve by instituting the proceedings therein, Lallah had the right to have a final determination as to the extent of the power which she could exercise, and the Trustee had the right to protect itself against possibility that it might be required in its capacity as trustee of the Residuary Trust to contest any exercise by Lallah of her power of appointment in favor of her estate. Cf. *Wyeth v. Safe Deposit & Trust Co. of Baltimore*, 176 Md. 369 (1939). These rights should not be prejudiced by any failure of the opposing parties to present a defense, at least in the absence of a showing that the absence of a defense was procured by the petitioners. Equally, their rights should not be prejudiced by any failure of the state court to exercise a full measure of judicial discretion. They did all that they could do when they brought the proceedings in the form prescribed by Maryland law, presented their evidence to the judicial officer appointed to conduct hearings in such matters and submitted their legal arguments to such officer.

Concededly the precise point which was passed on in the state court proceedings has never been passed on directly by the Court of Appeals of Maryland. Accordingly, it was open for decision by the *nisi prius* state court and the decision of that court was not contrary to any settled

rule established by prior binding appellate decisions. Also, concededly, the language in the instrument would have been sufficiently broad to enable Lallah to appoint to her estate under the law of all states except Maryland. Accordingly, the decision of the state court cannot properly be regarded as disregarding the language of the Will. Cf. *Faulkerson v. United States*, 301 F. 2d 231 (Cir. 7, 1962). Finally, there is no basis in the record of the proceedings in the state court for a finding that the petitioners therein practiced any fraud on the court, or sought improperly to influence the court or sought to have it do anything other than render its own independent judgment.

As stated *supra*, the decision of the Court of Appeals for the Fourth Circuit is directly contrary to the decision of the Court of Appeals for the Third Circuit in *Gallagher v. Smith*, 223 F. 2d 218 (Cir. 3, 1955). In *Gallagher*, which involved the incidence of income taxes, the will created a trust which provided for the distribution of the income to the decedent's wife "for her benefit, maintenance and support and that of all my children living with her at the time. * * *" Commencing with 1943 (the year following the year in which the decedent died), the widow and twelve of her children each reported one-thirteenth of the income. In 1947, five years after the decedent's death, the widow executed a "Confirmation of Release and Disclaimer" by which she confirmed her release of any interest in excess of one-thirteenth. In 1948 the account of the trustees was called for audit before the Orphans' Court of Philadelphia County. This account had been filed so that its confirmation might provide a basis for the discharge of a co-trustee. Notice of the filing of the account and of the date for the audit was given to the Collector of Internal Revenue. Thereafter the Orphans' Court filed its adjudication confirming the account and

awarding the balance of the income to the widow and the twelve children in equal shares.

The District Court held that the decision of the Orphans' Court was not binding on it, that under Pennsylvania law the widow was entitled to all of the income, that the trust was a spendthrift trust under Pennsylvania law, and that accordingly the "Confirmation of Release and Disclaimer" was ineffectual. 119 F. Supp. 360 (D.C.E.D. Pa., 1953). The Court of Appeals reversed, and held that the decision of the Orphans' Court was binding.

So far as appears from the opinions of the District Court and the Third Circuit Court of Appeals in *Gallagher*, the accounting proceedings were not contested, the Orphans' Court did not consider the applicable Pennsylvania law and the decision was contrary to Pennsylvania law. Nevertheless, the Third Circuit held that the decision in the state court was binding because it decided questions which had been fairly posed to the state court and the state court had been left free to decide them according to its own independent judgment. 223 F. 2d at 226.

It is respectfully submitted that the proceedings in the Circuit Court of Baltimore City in the present case more than meet the test of *Gallagher*. The decision was not merely incidental to a proceeding for an accounting, but instead was rendered in a case brought specifically for the purpose of securing a construction of the Will. Testimony was submitted, and was followed by a memorandum of facts and authorities. The master-examiner reached his own independent judgment based on his own reading of the Will, and his decision was not contrary to any directly applicable Maryland case. Therefore, it is respectfully submitted that the decision of the Fourth Circuit Court of Appeals denying binding effect to the state court proceed-

ings is in direct conflict with the decision of the Third Circuit Court of Appeals in *Gallagher*.

It is further submitted that the rule adopted by the Third Circuit Court of Appeals is in accord with the decisions of this Court in *Freuler* and *Blair*. It is not contended that every decision of a state court should be deemed to be absolutely binding, without regard to the circumstances under which it was rendered. But it is submitted that such decisions should be binding where they are rendered in regularly instituted and prosecuted state court proceedings without active collusion by the several parties to secure an otherwise unwarranted decision.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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JOHN W. CABLE III,
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APPENDIX A

68A Stat. 373, 26 U.S.C. 2001

SEC. 2001. RATE OF TAX.

A tax computed in accordance with the following table is hereby imposed on the transfer of the taxable estate, determined as provided in section 2051, of every decedent, citizen or resident of the United States dying after the date of enactment of this title:

If the taxable estate is:	*The tax shall be:*
Not over $5,000	3% of the taxable estate.
Over $5,000 but not over $10,000	$150, plus 7% of excess over $5,000.
Over $10,000 but not over $20,000	$500, plus 11% of excess over $10,000.
Over $20,000 but not over $30,000	$1,600, plus 14% of excess over $20,000.
Over $30,000 but not over $40,000	$3,000, plus 18% of excess over $30,000.
Over $40,000 but not over $50,000	$4,800, plus 22% of excess over $40,000.
Over $50,000 but not over $60,000	$7,000, plus 25% of excess over $50,000.
Over $60,000 but not over $100,000	$9,500, plus 28% of excess over $60,000.
Over $100,000 but not over $250,000	$20,700, plus 30% of excess over $100,000.
Over $250,000 but not over $500,000	$65,700, plus 32% of excess over $250,000.
Over $500,000 but not over $750,000	$145,700, plus 35% of excess over $500,000.
Over $750,000 but not over $1,000,000	$233,200, plus 37% of excess over $750,000.
Over $1,000,000 but not over $1,250,000	$325,700, plus 39% of excess over $1,000,000.
Over $1,250,000 but not over $1,500,000	$423,200, plus 42% of excess over $1,250,000.
Over $1,500,000 but not over $2,000,000	$528,200, plus 45% of excess over $1,500,000.
Over $2,000,000 but not over $2,500,000	$753,200, plus 49% of excess over $2,000,000.
Over $2,500,000 but not over $3,000,000	$998,200, plus 53% of excess over $2,500,000.
Over $3,000,000 but not over $3,500,000	$1,263,200, plus 56% of excess over $3,000,000.
Over $3,500,000 but not over $4,000,000	$1,543,200, plus 59% of excess over $3,500,000.

If the taxable estate is:	*The tax shall be:*
Over $4,000,000 but not over $5,000,000...	$1,838,200, plus 63% of excess over $4,000,000.
Over $5,000,000 but not over $6,000,000...	$2,468,200, plus 67% of excess over $5,000,000.
Over $6,000,000 but not over $7,000,000...	$3,138,200, plus 70% of excess over $6,000,000.
Over $7,000,000 but not over $8,000,000...	$3,838,200, plus 73% of excess over $7,000,000.
Over $8,000,000 but not over $10,000,000..	$4,568,200, plus 76% of excess over $8,000,000.
Over $10,000,000	$6,088,200, plus 77% of excess over $10,000,000.

68A Stat. 392, 26 U.S.C. 2056

SEC. 2056. BEQUESTS, ETC., TO SURVIVING SPOUSE.

(a) ALLOWANCE OF MARITAL DEDUCTION.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviing spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) LIMITATION IN THE CASE OF LIFE ESTATE OR OTHER TERMINABLE INTEREST.—

(1) GENERAL RULE.—Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest—

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy

any part of such property after such termination or failure of the interest so passing to the surviving spouse; and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under subparagraphs (A) and (B))—

(C) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For purposes of this paragraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

(2) INTEREST IN UNIDENTIFIED ASSETS.—Where the assets (included in the decedent's gross estate) out of which, or the proceeds of which, an interest passing to the surviving spouse may be satisfied include a particular asset or assets with respect to which no deduction would be allowed if such asset or assets passed from the decedent to such spouse, then the value of such interest passing to such spouse shall, for purposes of subsection (a), be reduced by the aggregate value of such particular assets.

(3) INTEREST OF SPOUSE CONDITIONAL ON SURVIVAL FOR LIMITED PERIOD.—For purposes of this subsection, an interest passing to the surviving spouse shall not be considered as an interest which will terminate or fail on the death of such spouse if—

(A) such death will cause a termination or failure of such interest only if it occurs within a period not exceeding 6 months after the decedent's death, or only if it occurs as a result of a common disaster resulting in the death of the decedent and the surviving spouse, or only if it occurs in the case of either event; and

(B) such termination or failure does not in fact occur.

(4) VALUATION OF INTEREST PASSING TO SURVIVING SPOUSE.—In determining for purposes of subsection (a) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this section—

(A) there shall be taken into account the effect which the tax imposed by section 2001, or any estate, succession, legacy, or inheritance tax, has on the net value to the surviving spouse of such interest; and

(B) where such interest or property is encumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, such encumbrance or obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined.

(5) LIFE ESTATE WITH POWER OF APPOINTMENT IN SURVIVING SPOUSE.—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

(A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse and

(B) no part of the interest so passing shall, for purposes of paragraph (1) (A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

(6) LIFE INSURANCE OR ANNUITY PAYMENTS WITH POWER OF APPOINTMENT IN SURVIVING SPOUSE.—In the case of an interest in property passing from the decedent consisting of proceeds under a life insurance, endowment, or annuity contract, if under the terms of the contract such proceeds are payable in installments or are held by the insurer subject to an agreement to pay interest thereon (whether the proceeds, on the termination of any interest payments, are payable in a lump sum or in annual or more frequent installments), and such installment or interest payments are payable annually or at more frequent intervals, commencing not later than 13 months after the decedent's death, and all amounts, or a specific portion of all such amounts, payable during the life of the surviving spouse are payable only to such spouse, and such spouse has the power to appoint all amounts, or such specific portion, payable under such contract (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), with no power in any other person to appoint such amounts to any person other than the surviving spouse—

(A) such amounts shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

(B) no part of such amounts shall, for purposes of paragraph (1) (A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if, under the terms of the contract, such power in the surviving spouse to appoint such amounts, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

(c) LIMITATION ON AGGREGATE OF DEDUCTIONS.—

(1) GENERAL RULE.—The aggregate amount of the deductions allowed under this section (computed without regard to this subsection) shall not exceed 50 percent of the value of the adjusted gross estate, as defined in paragraph (2).

(2) COMPUTATION OF ADJUSTED GROSS ESTATE.—

(A) GENERAL RULE.—Except as provided in subparagraph (B) of this paragraph, the adjusted gross estate shall, for purposes of subsection (c) (1), be computed by subtracting from the entire value of the gross estate the aggregate amount of the deductions allowed by sections 2053 and 2054.

(B) SPECIAL RULE IN CASES INVOLVING COMMUNITY PROPERTY.—If the decedent and his surviving spouse at any time, held property as community property under the law of any State, Territory, or possession of the United States, or of any foreign country, then the adjusted gross estate shall, for purposes of subsection (c) (1), be determined by subtracting from the entire value of the gross estate the sum of—

(i) the value of property which is at the time of the death of the decedent held as such community property; and

(ii) the value of property transferred by the decedent during his life, if at the time of such transfer the property was held as such community property; and

(iii) the amount receivable as insurance under policies on the life of the decedent, to

the extent purchased with premiums or other consideration paid out of property held as such community property; and

(iv) an amount which bears the same ratio to the aggregate of the deductions allowed under sections 2053 and 2054 which the value of the property included in the gross estate, diminished by the amount subtracted under clauses (i), (ii), and (iii) of this subparagraph, bears to the entire value of the gross estate.

For purposes of clauses (i), (ii), and (iii), community property (except property which is considered as community property solely by reason of the provisions of subparagraph (C) of this paragraph) shall be considered as not "held as such community property" as of any moment of time, if, in case of the death of the decedent at such moment, such property (and not merely one-half thereof) would be or would have been includible in determining the value of his gross estate without regard to the provisions of section 402 (b) of the Revenue Act of 1942. The amount to be subtracted under clauses (i), (ii), or (iii) shall not exceed the value of the interest in the property described therein which is included in determining the value of the gross estate.

(C) COMMUNITY PROPERTY—CONVERSION INTO SEPARATE PROPERTY.—

(i) AFTER DECEMBER 31, 1941.—If after December 31, 1941, property held as such community property (unless considered by reason of subparagraph (B) of this paragraph as not so held) was by the decedent and the surviving spouse converted, by one transaction or a series of transactions, into separate property of the decedent and his spouse (including any form of coownership by them), the separate property so acquired by the decedent and any

property acquired at any time by the decedent in exchange therefor (by one exchange or a series of exchanges) shall, for the purposes of clauses (i), (ii), and (iii) of subparagraph (B), be considered as "held as such community property."

(ii) LIMITATION.—Where the value (at the time of such conversion) of the separate property so acquired by the decedent exceeded the value (at such time) of the separate property so acquired by the decedent's spouse, the rule in clause (i) shall be applied only with respect to the same portion of such separate property of the decedent as the portion which the value (as of such time) of such separate property so acquired by the decedent's spouse is of the value (as of such time) of the separate property so acquired by the decedent.

(d) DISCLAIMERS.—

(1) BY SURVIVING SPOUSE.—If under this section an interest would, in the absence of a disclaimer by the surviving spouse, be considered as passing from the decedent to such spouse, and if a disclaimer of such interest is made by such spouse, then such interest shall, for the purposes of this section, be considered as passing to the person or persons entitled to receive such interest as a result of the disclaimer.

(2) BY ANY OTHER PERSON.—If under this section an interest would, in the absence of a disclaimer by any person other than the surviving spouse, be considered as passing from the decedent to such person, and if a disclaimer of such interest is made by such person and as a result of such disclaimer the surviving spouse is entitled to receive such interest, then such interest shall, for the purposes of this section, be considered as passing, not to the surviving spouse, but to the person who made the disclaimer, in the same manner as if the disclaimer had not been made.

(e) DEFINITION.—For purposes of this section, an interest in property shall be considered as passing from the decedent to any person if and only if—

(1) such interest is bequeathed or devised to such person by the decedent;

(2) such interest is inherited by such person from the decedent;

(3) such interest is the dower or curtesy interest (or statutory interest in lieu thereof) of such person as surviving spouse of the decedent;

(4) such interest has been transferred to such person by the decedent at any time;

(5) such interest was, at the time of the decedent's death, held by such person and the decedent (or by them and any other person) in joint ownership with right of survivorship;

(6) the decedent had a power (either alone or in conjunction with any person) to appoint such interest and if he appoints or has appointed such interest to such person, or if such person takes such interest in default on the release or nonexercise of such power; or

(7) such interest consists of proceeds of insurance on the life of the decedent receivable by such person.

Except as provided in paragraph (5) or (6) of subsection (b), where at the time of the decedent's death it is not possible to ascertain the particular person or persons to whom an interest in property may pass from the decedent, such interest shall, for purposes of subparagraphs (A) and (B) of subsection (b) (1) be considered as passing from the decedent to a person other than the surviving spouse.

APPENDIX B

Memorandum Findings of Fact and Opinion of the Tax Court of the United States

DRENNEN, *Judge:* Respondent determined a deficiency in estate tax due from petitioner in the amount of $32,542.48.

The only issue for decision is whether the estate of Mervin G. Pierpont is entitled to a marital deduction equal to the value of property devised and bequeathed in trust for the benefit of the surviving spouse of decedent, who was given under decedent's will a testamentary power of appointment with respect to the trust estate.

Findings of Fact

Some of the facts have been stipulated and are found accordingly.

Ernest L. Poyner (hereinafter referred to as Poyner) and Union Trust Company of Maryland, a Maryland corporation, are the duly appointed executors, by an order of the Orphans' Court of Baltimore City dated February 9, 1956, of the estate of Mervin G. Pierpont, deceased.

Mervin G. Pierpont (hereinafter referred to as decedent) died testate on January 31, 1956, survived by his wife, Lallah R. Pierpont (hereinafter referred to as Lallah), who was his second wife. The estate tax return of decedent's estate was duly filed by the executors with the district director of internal revenue at Baltimore, Maryland, on April 29, 1957.

Item Sixth of decedent's will, which was executed by him on January 10, 1951, provided as follows:

> ITEM SIXTH: Provided my said wife shall survive me, I direct my Executors to determine an amount which will be equal to one-half of my "Adjusted Gross Estate" (as defined in Paragraph (2)(A) of subsection (e) of section 812 of the U.S. Internal Revenue Code as amended by the Revenue Act of 1948) and to deduct

from such amount the total value, as finally determined for Federal Estate tax purposes of all other interests in property which are included in my Adjusted Gross Estate but which will pass or will have passed to my said wife, by operation of law or in any other manner, and assets of my estate equal in value (as finally determined for Federal estate tax purposes) to such resulting net sum I give, devise and bequeath unto UNION TRUST COMPANY OF MARYLAND, a body corporate organized under the laws of the State of Maryland (hereinafter called the "Trustee"), as Trustee and its successor in trust, to be held in trust for the uses and purposes hereinafter set forth, such trust to be known as the LALLAH R. PIERPONT TRUST. The Trustee shall collect the income, rents and profits from this Trust and after the payment of all taxes thereon and all expenses and charges incident to the management thereof, shall, accounting from the date of my death, pay over and distribute the net income and principal thereof in the following manner:

(a) The Trustee shall pay to my said wife, in quarterannual installments, all of the income during the remainder of her lifetime.

(b) In addition, the Trustee shall pay to my said wife out of principal an amount equivalent to the income accumulated in the residuary trust established under the terms of Item Seventh of this Will, provided that the total amount of income and principal to be paid to my said wife in any one period of twelve (12) months shall be not less than the sum of Six Thousand Dollars ($6,000.00) and provided further, that if the income from this LALLAH R. PIERPONT TRUST plus the income accumulated under the terms of Item Seventh of this Will shall be in excess of Ten Thousand Dollars ($10,000.00) the Trustee shall pay from the principal of this LALLAH R. PIERPONT TRUST only such amount as is required to make the total payments of income and principal equal the sum of Ten Thousand Dollars ($10,000.00) for each period of twelve (12) months.

(c) In addition to the distribution of income and/or principal as provided for herein, the Trustee shall have authority in its sole and absolute discretion, to make payments out of principal to the extent that it may deem necessary and proper for the reasonable and comfortable support of my said wife in accordance with her station in life; and for the purpose of providing for her in the event of accident, illness, misfortune or other emergency. I direct that in exercising such discretionary powers the Trustee shall take into consideration the other financial resources of my said wife and shall make only such discretionary payments as may be necessary to supplement such other financial resources; provided however, that as a prerequisite to the making of such discretionary payments the Trustee shall not require the liquidation of such of her other financial resources as, in its sole and absolute discretion, it may deem inadvisable to liquidate under then existing circumstances. I further direct that in considering the other financial resources of my said wife the Trustee may accept as conclusive evidence thereof her written statement as to the amount of her financial resources.

(d) I desire to make clear my intention that the immediate and continuing welfare and comfort of my said wife are matters of primary concern to me rather than the retention and appreciation of the principal of this Trust Estate and I therefore direct that, notwithstanding anything in this Will to the contrary, each of the provisions hereof shall be construed liberally in order to accomplish such intention. In the event that any asset of this Trust Estate shall be non-income producing I direct the Trustee to liquidate such asset as promptly as is consistent with prudent investment management, and during the time such asset shall be non-income producing to pay to my said wife from principal such amounts as in the Trustee's judgment will compensate her for loss of income caused by undue delay in converting such non-income producing asset into an income producing asset.

(e) Upon the death of my said wife the entire remaining principal of the LALLAH R. PIERPONT TRUST, or such portion thereof as may be validly appointed, shall be paid over free of this Trust in such manner and proportions as my said wife may designate and appoint in her Last Will and Testament. The power of appointment herein granted to my said wife shall be exercisable by her alone and in all events. To the extent that my said wife does not exercise a valid power of appointment in accordance with the power herein granted, that portion or all, as the case may be, of the principal of the LALLAH R. PIERPONT TRUST over which my said wife has failed to exercise a valid power of appointment shall be distributed absolutely to the Trustee of the residuary Trust created by Item Seventh of this Will, to be retained in trust and/or distributed in the same manner and under the same conditions as though such additions had been a part of the original principal of such residuary trust.

By Item Seventh, decedent devised and bequeathed the residue of his estate to Union Trust Company of Maryland as trustee for the benefit of named beneficiaries and provided further:

(b) During such time as my said wife shall receive benefits from the LALLAH R. PIERPONT TRUST the Trustee shall accumulate the income and add the same to principal. Accounting from the date on which my said wife shall receive the final payment of income and/or principal to which she is entitled under the LALLAH R. PIERPONT TRUST, the Trustee shall pay her, until her remarriage or death, whichever event shall first occur, all of the net income but not less than the sum of Six Thousand Dollars ($6,000.00) and not more than the sum of Ten Thousand Dollars ($10,000.00) in any one period of twelve (12) months. To the extent that the net income in any such period shall total less than Six Thousand Dollars ($6,000.00) the Trustee shall pay out of principal an amount which when added to the net income will total such sum. To the extent that the net

income in any such period shall be in excess of Ten Thousand Dollars ($10,000.00) the Trustee shall accumulate such excess and shall add it to principal.

(c) Upon the remarriage or death of my said wife, whichever event shall first occur, or upon my death if my said wife shall have predeceased me, the Trust Estate shall be held for the benefit of my said son William M. Pierpont upon the terms and provisions hereinafter set forth.

(d) The Trustee shall pay to my said son, William M. Pierpont, until his death or until he shall have withdrawn the entire principal of the Trust Estate as hereinafter provided, all of the net income. My said son, William M. Pierpont, may at any time upon written request to the Trustee, withdraw any or all of the principal of the Trust Estate.

(e) My said son, William M. Pierpont, shall have the right to appoint by Last Will and Testament who of his spouse and/or descendants shall be entitled to the remainder of the Trust Estate in the hands of the Trustee at the time of the remarriage of my said wife, or the death of my said wife, or the death of my said son, William M. Pierpont, whichever event shall last occur, and the portions to which such persons shall be entitled, either absolutely or in trust upon such terms and conditions as may be specified in such Last Will and Testament. Such appointment shall be exercised only by specific reference to the power herein granted. To the extent that a specific and valid limited power of appointment is not exercised, the Trust Estate shall be held under the terms of paragraph (f) of this Item Seventh for the descendants of my said son, William M. Pierpont, living at the time of the remarriage of my said wife, or the death of my said wife, or the death of my said son, William M. Pierpont, whichever event shall last occur.

* * * * * *

(i) If at any time there shall remain in the hands of the Trustee any portion of the Trust Estate not otherwise allocable or distributable under any other provision of this Will, the Trustee shall distribute absolutely such portion to the Grand Lodge Ancient Free and Accepted Masons of Maryland, a body corporate, for the use and benefit of the Masonic Homes at Cockeysville, Maryland, known as Bonnie Blink.

After provision for broad administrative powers in the trustee, decedent provided in Item Eighth of his will as follows:

ITEM EIGHTH: The following provisions shall apply equally to each of the trusts created under Item Sixth and Item Seventh of this Will:

(a) The Trustee shall make all payments of income or principal directly into the hands of the beneficiary entitled to the same and not into the hands of another, whether claiming by his authority or otherwise, and neither the income nor principal shall be subject to assignment or order, nor be anticipated in any manner whatsoever, nor be liable for the debts, contracts or engagements of a beneficiary, nor be taken in execution by attachment, garnishment or other legal or equitable proceeding while in the hands of the Trustee; provided however, that deposit to the credit of a beneficiary in any bank or trust company shall be deemed to be the equivalent of payment into his hands; * * *

Poyner, as trust officer of Union Trust Company of Maryland, and as a friend of decedent, discussed with decedent his proposed will over a period from about 1948 through 1950. They discussed generally the marital deduction features of the Federal estate tax, and on at least one occasion, Poyner told decedent that in order that the marital deduction be secured for the estate for the value of property conveyed in trust for the benefit of Lallah, she would have to be granted an "unlimited" power of appointment. Poyner, however, did not tell decedent that Lallah would

have to be granted specifically the testamentary power to appoint the corpus of the trust to her creditors or to her estate.

On October 20, 1958, Lallah, Union Trust Company of Maryland as trustee of the trust created under Item Sixth of decedent's will, and Poyner and the Union Trust Company of Maryland, as executors of the estate of decedent, brought suit in the Circuit Court of Baltimore City under the Uniform Declaratory Judgments Act (Md. Anno. Code art. 31A (1957)), and joined as the defendants the decedent's son, daughter-in-law, granddaughters, unborn children and more remote unborn descendants of the decedent's son, and the Grand Lodge Ancient Free and Accepted Masons of Maryland, contingent remaindermen under the trust created under the provisions of Item Seventh of decedent's will. The petition prayed the following relief:

> (a) That this Court construe the last Will and Testament of the Decedent for the purpose of determining the nature and scope of the power of appointment given to the Petitioner Lallah R. Pierpont over the principal of the Trust created under Item Sixth of the said Will;

All persons named defendants to the aforesaid proceedings in the Circuit Court of Baltimore City were duly summoned and upon failure of any legal guardian to appear for the infant defendants and unborn children and more remote unborn children of the decedent's son, the court appointed a legal guardian for such infant defendants and unborn children and more remote unborn descendants of the decedent's son. This guardian in his answer to the aforesaid petition stated that the infants, being under 21 years of age "cannot admit nor deny the allegations set up in said Bill of Complaint and therefore submit their rights" to the equity court.

Upon failure of the other defendants in the aforesaid action to appear, the Circuit Court of Baltimore City passed a decree pro confesso against the defendants named in the petition and referred the matter to an examiner-master of

the court to take testimony to support the allegations of the petition. Subsequently, the Grand Lodge Ancient Free and Accepted Masons of Maryland filed an answer to the petition in which they agreed that the court might grant the relief prayed for in the petition.

The examiner, at hearings on two occasions, received the testimony of Poyner relating to decedent's intention in providing that Lallah was to have a testamentary power of appointment with respect to the corpus of the trust established under Item Sixth of the will. The lawyer who had drafted the will for decedent and who advised him with regard to it gave no testimony at the hearings before the examiner and wrote the examiner that he had no "sufficient recollection of the discussions with Mr. Pierpont and Mr. Poyner of the Union Trust Company to be able to testify as to any matters which would not be apparent from the examination of the will."

The testimony of Poyner, which was to the effect that he advised decedent that Lallah should be given an "unlimited" testamentary power of appointment with respect to the corpus of the trust, in order to obtain the benefit of the marital deduction to the maximum extent, was the only evidence submitted to the examiner.

During the course of the action, counsel on behalf of petitioners in the declaratory judgment proceeding, filed a memorandum of law with the examiner in which they recited the provisions of section 812(e)(1)(F), I.R.C. 1939. They explained that two testamentary trusts were established under decedent's will; that all of the income from the trust created for the benefit of Lallah was to be paid to her during her lifetime; that decedent intended to take advantage of the marital deduction allowed under the provisions of section 812(e); and that the benefit of the marital deduction could not be obtained unless Lallah had a testamentary power of appointment to appoint to her estate the corpus of the trust established for her benefit. It was argued that decedent's specific intention that Lallah have such a power of appointment as would satisfy the requirements of section 812(e)(1)(F) should be given effect and

that decedent's will should be construed in the light of this intention, and that such a construction would neither "violate any positive rule of law" of Maryland, "nor would it in any sense vary or add to the words used by the Decedent in granting the power" to Lallah under Item Sixth of the will.

Without making an independent study of the law of Maryland which might bear on the question, the examiner filed a report with the Circuit Court of Baltimore City in the proceeding for a declaratory judgment. The examiner adopted verbatim the facts and argument set forth in the memorandum submitted by Lallah's counsel, including the following concluding paragraph thereof:

> Accordingly, it is respectfully submitted that a decree should be entered determining that under a proper construction of the Last Will and Testament of the Decedent the Petitioner, Lallah R. Pierpont, has the power to appoint all or any part of the corpus of the trust estate [of the trust established under Item Sixth of decedent's will] to her estate.

The case, which was a noncontested proceeding, was heard by the examiner-master in chancery. Pursuant to the examiner-master's report, the Circuit Court of Baltimore City entered a decree on April 3, 1961. However, the decree, after finding that the court had jurisdiction, provided:

> 2. That the proper construction of Item Sixth of said Last Will and Testament of Mervin G. Pierpont, deceased, is, and it is hereby determined and declared:
>
> (a) That Paragraph (e) of said Item Sixth grants a general power to Lallah R. Pierpont to appoint by her Last Will and Testament all or any part of the corpus of the trust estate created by said Item Sixth which may remain at her death, free of the trust created by said Item Sixth; and
>
> (b) That Lallah R. Pierpont has the power under said Paragraph (e) of said Item Sixth validly to

appoint by her Last Will and Testament all or any part of the corpus of the trust estate created by said Item Sixth which may remain at her death to her estate, free of the trust created by said Item Sixth.

Under the laws of the State of Maryland the period for taking an appeal from such decree expired on May 3, 1961. No appeal was taken from such decree.

Opinion

Respondent has determined that in computing the Federal estate tax due from the estate of decedent no marital deduction is allowable for the value of property passing by virtue of decedent's will to the trustee of the Lallah R. Pierpont Trust.

In summary, the provisions of section 2056(b)(5),[1] pertinent to the present issue, require, in order that the value of the property passing to Lallah's trust qualify for the marital deduction, and that Lallah's interest in the trust estate not be deemed a terminable interest, the following: (1) Lallah must be entitled for life to all of the income of the trust; (2) such income must be payable to Lallah annually or at more frequent intervals; (3) Lallah must have the right to appoint the interest to herself or to her estate; (4) such power (whether exercisable by will or during life) must be exercisable by her alone and in all events; (5) the entire interest must not be subject to a power in any other person to appoint any part to any person other than Lallah.

It is obvious that Lallah's interest under the provisions of decedent's will satisfies these requirements with one exception. It is not clear that, although she was granted a testamentary power of appointment with respect to trust corpus, she has the right to appoint to her estate.[2] The

[1] All statutory references are to the Internal Revenue Code of 1954, unless otherwise indicated.

[2] Since Lallah has only a testamentary power of appointment, she cannot of course appoint to herself.

parties agree that the narrow question for decision is whether she has that right.

Ordinarily, Lallah's power of appointment would be deemed general; that is, there would be no limitations on her choice of appointees, including her estate or her creditors. See *Morgan v. Commissioner*, 309 U.S. 78 (1940). But the scope of Lallah's power of appointment is to be determined under the law of Maryland, and, as this Court has recognized in *Estate of William C. Allen*, 29 T.C. 35 (1957), the donee of an otherwise general power of appointment does not, under Maryland law, have the right to appoint property subject to the power, to his estate or for payment of his debts, absent language expressly conferring such right in the instrument by which the power of appointment is granted.

Because decedent in his will did not expressly grant to Lallah the right in question, it would appear that respondent's determination must be sustained on the authority of *Estate of William C. Allen, supra*. Petitioner advances three arguments by which it is contended that respondent's determination is incorrect and that the *Allen* case is not controlling. It is said, first, that it has been decreed by a Maryland court in the declaratory judgment proceeding described in our findings that Lallah has the requisite right, which had not been done in the *Allen* case, and that this decree is binding upon us and conclusive on the question; secondly, that the rule set forth in the *Allen* case does not prevail in Maryland but finds support only in dicta from the opinions in certain Maryland authorities; and, thirdly, that, in any event, the evidence shows that decedent intended to grant Lallah a power that would qualify her interest for the marital deduction, and that, since the nature and extent of Lallah's power involves a construction of decedent's will, under the usual rules governing such construction, it must be held that decedent's intention is to be effectuated and, consequently, Lallah's power must be construed to embrace the right to appoint by will to her estate.

We consider at the outset the question of whether the decree of the Circuit Court of Baltimore City is conclusive upon the issue herein presented. We have outlined in our findings the circumstances under which, in the proceeding for a declaratory judgment, the decree was obtained, and we conclude that the decree is not binding upon us because the proceeding was nonadversary and because Lallah's petition therein, upon which the decree was based, was admittedly uncontested and the only apparent purpose thereof was to obtain a tax advantage. In effect, the decree was a consent decree, and does not settle the instant question for Federal tax purposes. *Faulkerson's Estate v. United States*, 301 F. 2d 231 (C.A. 7, 1962); *Saulsbury v. United States*, 199 F. 2d 578 (C.A. 5, 1952); *Estate of Ralph Rainger*, 12 T.C. 483 (1949), affirmed per curiam 183 F. 2d 587 (C.A. 9, 1950), certiorari denied 341 U.S. 904 (1951); *Estate of Howard E. Stevens*, 36 T.C. 184 (1961); *Estate of Arthur Sweet*, 24 T.C. 488 (1955), affd. 234 F. 2d 401 (C.A. 10, 1956), certiorari denied 352 U.S. 878 (1956); *Estate of Charles Elson*, 28 T.C. 442 (1957). See also *Merchants National Bank & Trust Co. v. United States*, 246 F. 2d 410 (C.A. 7, 1957). We do not believe there has been a showing that the decree represents the "deliberate conclusion" of the court. See *Blair v. Commissioner*, 300 U.S. 5 (1937).

[Furthermore, the decree here did not determine the present property rights or the extent of the interest of any individual in property which would be binding on the beneficiaries in the future for ownership purposes regardless of the outcome of the Federal court case, as was the situation in *Freuler v. Helvering*, 291 U.S. 35 (1934); *Pitts v. Hamrick*, 228 F. 2d 486 (C.A. 4, 1955), and other cases relied on by petitioner. Cf. *Estate of William A. Landers, Sr.*, 38 T.C. (Sept. 13, 1962). Here the most that can be said of the local court decree was that it decided Lallah could appoint the remaining corpus of the trust free of the trust by her will. It did not decide to whom she should or would appoint it but only, according to petitioner, that she might appoint it to her estate.

And finally, we fail to see how the decree of the Circuit Court of Baltimore City specifically gave Lallah the right to appoint to her estate, or in fact was any more specific in this regard than the words in the will. While the examiner-master's report submitted that a decree should be entered determining that under a proper construction of the will Lallah has the power to appoint the corpus of the trust to her estate, the decree of the court itself contained no such specific language and declared only that paragraph (e) of Item Sixth granted a general power to Lallah to appoint by will the corpus of the trust free of the trust, and that Lallah has the power under that paragraph validly to appoint by will the remaining corpus of the trust free of the trust. It nowhere mentions appointing to her estate and it appears that under Maryland law a general power of appointment is not as unlimited as it ordinarily is. See discussion following.]*

We consider next whether Maryland law is as set forth in *Estate of William C. Allen, supra.* Upon careful consideration of the arguments presented by the parties, we believe that this Court has enunciated in *Allen* the rule of Maryland law governing this controversy: A donee of a granted power of appointment does not have the right to appoint to his estate unless the donor has, by express language to that effect, authorized him to do so. In *Allen* this Court relied upon language from the opinion in *Lamkin v. Safe Deposit & Trust Co.*, 192 Md. 472, 64 A. 2d 704 (1949), to discern Maryland law, and it is argued that this language was mere dictum. We disagree. A careful reading of the *Lamkin* opinion shows that the court in that case was directly concerned with the invalidity, partial or complete, of a donee's appointment to a particular creditor and for payment of debts generally by her executor. The rule which we found governing in *Allen* was applied by the Maryland court in *Lamkin* to an issue in the case and was not dictum. See also *Leser v. Burnet*, 46 F. 2d 756 (C.A. 4, 1931); *Connor v. O'Hara*, 188 Md. 527, 53 A. 2d 33 (1947).

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* The two paragraphs within brackets were stricken and deleted per Order of February 6, 1963, *infra*, p.

The final point of argument for consideration is whether decedent's will, properly construed, grants the requisite right to Lallah. As we have pointed out, there is no express language in the will conferring the right upon Lallah, but it is argued the decedent's intention, being of paramount concern, is to be effectuated through a construction by which Lallah will be deemed to have the right in issue. Subject to respondent's motion to strike at the hearing in this case, we heard testimony from Poyner bearing upon decedent's intention in writing the will. We need not pass on respondent's motion because the testimony proves no more than does the will. It is apparent from a reading of the will that decedent desired to secure the benefit of the marital deduction for his estate, and it was to that end, it is probable if not certain, that he made provision for the Lallah R. Pierpont Trust. But even if it be accepted that the Maryland rule to which we have alluded is merely a rule of construction which must yield to a showing of the decedent's intention contrary to the rule, we must hold against petitioner.

We, or any court confronted with the issue, can do no more than construe decedent's language in his will. Here, there is no language which, under any view of the matter, can be taken as an express grant to Lallah of the right to appoint trust corpus to her estate. Thus, even if it be known that decedent specifically intended that Lallah have the right, that intention could be effectuated only by the decedent's use of such language in his will that would permit a court to construe the language in accord with that intention.

But even if we can consider the decedent's intention here, the critical question is whether decedent intended Lallah to have the right to appoint to her estate. The only thing proved in this proceeding or in the declaratory judgment proceeding is that decedent wanted to secure the benefit of the marital deduction. We do not know that decedent knew that Lallah should have the right to appoint to her estate, much less that he intended to grant her that right. Lallah was decedent's second wife, and he had children by

his first wife. Furthermore, in Item Eight decedent inserted a spendthrift clause with respect to the income and principal of Lallah's trust. Thus, the evidence may demonstrate a motive to take advantage of the marital deduction but not the intention to give Lallah the necessary powers to qualify the trust for the deduction, see *Northwest Security Nat. Bank of Sioux Falls v. Welch*, 203 F. Supp. 263 (S.D. S. Dak. 1962), for neither on the basis of the record herein nor on the evidence adduced in the declaratory judgment proceeding,[3] can a specific intent on the part of decedent to grant Lallah the right to appoint to her estate be determined.

We conclude that the power of appointment granted to Lallah in decedent's will does not qualify for the marital deduction and that the value of the property passing to the Lallah R. Pierpont Trust is not deductible for estate tax purposes.

To reflect uncontested adjustments and deductible expenses incurred herein.

Decision will be entered under Rule 50.

Order

This case came on for hearing at Washington, D.C., on February 6, 1963, on petitioner's motion for reconsideration, both parties being present in Court by counsel.

The Court being of the opinion that there was merit in the first ground for reconsideration mentioned in petitioner's motion, and respondent not objecting thereto, the motion for reconsideration was granted.

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[3] We have received in evidence and have considered the record, including testimony, of the Circuit Court in the declaratory judgment proceeding. See *Blair v. Commissioner*, 300 U.S. 5 (1937).

Thereupon the Court heard the arguments of the parties upon reconsideration. Petitioner took exception to certain language on page 15 of the Memorandum Findings of Fact and Opinion of this Court filed in this case on November 30, 1962. It appearing to the Court that the language used and the matters referred to therein need not be considered in arriving at a correct conclusion of the issue involved, it is hereby

ORDERED, that the two paragraphs starting on page 15 of the mimeographed Memorandum Findings of Fact and Opinion filed in this case on November 30, 1962, be and the same hereby are stricken and deleted from the opinion, the opinion in all other respects to remain as filed.

Upon reconsideration of the case on the record presented, the authorities cited, and the argument and briefs of counsel, the Court is of the opinion that the conclusion reached on the issue involved as enunciated in the Memorandum Findings of Fact and Opinion heretofore filed was correct, and that said Memorandum Findings of Fact and Opinion, as revised herein, correctly reflects the reasoning of the Court in reaching that conclusion. Wherefore it is

ORDERED, further, that decision be entered under Rule 50 of the Rules of Practice of this Court in accordance with the Memorandum Findings of Fact and Opinion filed herein on November 30, 1962, as revised herein.

/s/ W. M. DRENNEN,
Judge.

Dated: Washington, D.C.

February 6, 1963.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9398.

Estate of Mervin G. Pierpont, Deceased, Union Trust Company of Maryland and Ernest L. Poyner, Executors,
Petitioners,

versus

Commissioner of Internal Revenue,
Respondent.

ON PETITION TO REVIEW THE DECISION OF THE TAX COURT OF THE UNITED STATES.

(Argued June 19, 1964. Decided September 4, 1964.)

Before BRYAN and J. SPENCER BELL, Circuit Judges, and HEMPHILL, District Judge.

J. SPENCER BELL, Circuit Judge:

The Estate of Mervin G. Pierpont petitions for review of the Tax Court's decision that the estate was not entitled to a marital deduction with respect to a testamentary trust. The Tax Court concluded that the power granted by Pierpont's will to the life beneficiary, his wife, Lallah R. Pierpont, did not constitute, under Maryland law, a power to appoint the corpus of the trust to her estate within the meaning of Sec. 2056(b)(5) of the Internal Revenue Code of 1954. The language employed in creating the Lallah R. Pierpont Trust, quoted below, makes it clear that Pierpont desired to take advantage of the marital deduction provi-

sions of Sec. 2056(b) (5). Concededly the only controversy before the Tax Court and before this court on appeal is whether or not the power created met the third condition prescribed under Treasury Regulations, Sec. 20.2056(b)-5:

> "Sec. 20.2056(b)-5. Marital deduction; life estate with power of appointment in surviving spouse.
>
> "(a) In general. Section 2056(b)(5) provides that if an interest in property passes from the decedent to his surviving spouse (whether or not in trust) and the spouse is entitled for life to all the income from the entire interest . . . , with a power in her to appoint the entire interest . . . , the interest which passes to her is a deductible interest, to the extent that it satisfied all five of the conditions set forth below . . . :
>
> . . .
>
> "(3) The surviving spouse must have the power to appoint the entire interest . . . to . . . her estate."

In reaching the conclusion that the third condition had not been met, the Tax Court did not deem itself bound by a decree of the Circuit Court of Baltimore City, a *nisi prius* court, that Lallah held the requisite power of appointment.

In the fall of 1948, following the passage of the Internal Revenue Act of 1948, Pierpont began discussions with officers of a Maryland Trust Company concerning the preparation of his will. During these discussions, Pierpont expressed the dual desires to make adequate provision for his wife and to minimize estate taxes by taking advantage of the recently enacted marital deduction provision of the Internal Revenue Code. Trust Company officials suggested that Pierpont set up a testamentary trust, in favor of his wife, providing for income payments to her for life and granting her the power to appoint the principal at her death. These suggestions were followed, and Pierpont's attorney created the Lallah R. Pierpont Trust under Item Sixth of his will. Pertinent portions of the Trust provided:

> "ITEM SIXTH: Provided my said wife shall survive me, I direct my Executors to determine an amount

which will be equal to one-half of my "Adjusted Gross Estate" (as defined in Paragraph (2) (A) of subsection (e) of section 812 of the U. S. Internal Revenue Code as amended by the Revenue Act of 1948) and to deduct from such amount the total value, as finally determined for Federal Estate tax purposes of all other interests in property which are included in my Adjusted Gross Estate but which will pass or will have passed to my said wife, by operation of law or in any other manner, and assets of my estate equal in value (as finally determined for Federal estate tax purposes) to such resulting net sum I give, devise and bequeath unto [the named Trustee], as Trustee and its successor in trust, to be held in trust for the uses and purposes hereinafter set forth, such trust to be known as the LALIAH R. PIERPONT TRUST. The Trustee shall collect the income, rents and profits from this Trust and after the payment of all taxes thereon and all expenses and charges incident to the management thereof, shall, accounting from the date of my death, pay over and distribute the net income and principal thereof in the following manner:

"(a) The Trustee shall pay to my said wife, in quarter-annual installments, all of the income during the remainder of her lifetime.

. . .

"(e) Upon the death of my said wife the entire remaining principal of the LALLAH R. PIERPONT TRUST, or such portion thereof as may be validly appointed shall be paid over free of this Trust in such manner and proportions as my said wife may designate and appoint in her Last Will and Testament. The power of appointment herein granted to my said wife shall be exercisable by her alone and in all events. To the extent that my said wife does not exercise a valid power of appointment in accordance with the power herein granted, that portion or all, as the case may be, of the principal of the LALLAH R. PIERPONT TRUST

> over which my said wife has failed to exercise a valid power of appointment shall be distributed absolutely to the Trustee of the residuary Trust created by Item Seventh of this Will to be retained in trust and or distributed in the manner and under the same conditions as though such conditions had been a part of the original principal of such residuary trust."

Upon Pierpont's death in 1956, the executors of his estate filed a Federal Estate Tax Return with the District Director, claiming as a marital deduction the value of the Lallah R. Pierpont Trust. The Commissioner disallowed the deduction, and in apt time, the estate filed a petition for review in the Tax Court. Thereafter, the widow, the Trustee, and the Executors instituted an action for declaratory judgment in the Circuit Court of Baltimore City, petitioning that the court uphold Lallah's right to appoint by her will the corpus of the trust "to her estate." Joined as respondents were Pierpont's son, his daughter-in-law, their children and descendants, and a Masonic fraternal organization, the alternative beneficiaries of a residuary Trust under Item Seventh which was to receive the unappointed corpus of the Lallah R. Pierpont Trust. Any increase in the federal estate tax, resulting from a disallowance of the marital deduction would, *ipso facto*, decrease the corpus of the residuary trust, since the will under Item Third directed payment of estate and inheritance taxes from the residue.

All named respondents were duly summoned. Whether for tax considerations or some other, neither William nor his wife filed an answer to the petition and neither appeared individually nor by representative. The court appointed a guardian *ad litem* for William's children and descendants and the guardian, without admitting or denying the allegations of the complaint, by way of answer submitted his wards' rights for determination by the court. This answer was drafted by petitioners' counsel, who now represents the estate in the present controversy. The Masonic fraternal organization filed an answer agreeing that the court could grant the relief prayed for in the petition.

The Circuit Court of Baltimore City passed a decree *pro confesso* against the respondents named in the complaint and referred the matter to an examiner-master. After a hearing, which consisted in its entirety of the testimony of an officer of the Trust Company, the examiner-master filed his report and it was signed by the court. The report incorporated verbatim a memorandum of law submitted by petitioners' counsel,[1] including the last paragraph reading as follows:

> "Accordingly, it is respectfully submitted that a decree should be entered determining that under a proper construction of the Last Will and Testament of the Decedent the Petitioner, Lallah R. Pierpont, has the power to appoint all or any part of the corpus of the trust estate to her estate."

No appeal was taken from the decree.

On review of the Commissioner's deficiency determination by the Tax Court, that court held the decree not binding as to extent of Lallah's power of appointment because "the proceeding was non-adversary and because [the] petition therein, upon which the decree was based, was admittedly uncontested and the only apparent purpose

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[1] The examiner-master before the Tax Court testified as follows:

"Q. Did you do anything more than adopt the-verbatim-the memorandum of law filed in the proceeding by the petitioner . . . ? A. With the exception of the preface, which is the beginning . . . I adopted the memorandum which was submitted to me, and which I asked for, verbatim, word for word, with the exception of the first page. Every word is Mr. McDaniel's. Does that answer that?

"Q. . . . In preparing this report, did you look at any of these cases? *Connor v. O'Hara?* A. No.

"Q. *Lamkin v. Safe Deposit and Trust Company?* A. No, and not *Bernet.*

"Q. *Balls v. Dampman?* A. No, I didn't.

"Q. Nor *Leser v. Burnet?* A. No, I didn't.

"Q. What about the *Allen* case? A. I know about the *Allen* case now.

"Q. At the time you prepared— A. I didn't." (RECORD, pp. 67-68.)

thereof was to obtain a tax advantage. In effect, the decree was a consent decree, and does not settle the instant question for Federal tax purposes." The court then made an independent survey of the applicable Maryland law and concluded that "a donee of a granted power of appointment does not have the right to appoint to his estate unless the donor has, by express language to that effect, authorized him to do so." The court, therefore, upheld the Commissioner's determination of a deficiency.

The estate attacks both major premises of the Tax Court decision, contending that the Tax Court was conclusively bound by the decree of the Circuit Court of Baltimore City that Lallah had the power to appoint to her estate. It further contends that even if the Tax Court was not so bound, it erred in its independent determination that under Maryland law Lallah was unable to appoint to her estate. We are convinced that the Tax Court was correct on both points.

We recognize that we are bound by the law of Maryland in determining whether or not Lallah had those incidents of dominion over the corpus of the trust enumerated in the INT. REV. CODE of 1954, Sec. 2056(b)(5), that would qualify the estate to take a marital deduction. As stated by the Supreme Court in *Morgan v. Commissioner*, 309 U.S. 78, 80 (1940):

> "State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed."

See *Aquilino v. United States*, 363 U.S. 509, 513 (1960); *Helvering v. Stewart*, 317 U.S. 154, 161-62 (1942); *Uterhart v. United States*, 240 U.S. 598, 603 (1916).

The law of a state, under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), is what the judges of the appellate courts, in their collective wisdom, say it is. The same may not be said where the law of a state has been determined and applied by a *nisi prius* court, for its decisions, unlike those rendered by reviewing courts, do not lay down principles

of law that must be followed as binding precedents. *King v. Order of United Commercial Travelers of America*, 333 U.S. 153 (1948). Nonetheless, the Supreme Court has declared that such decisions, having settled property rights and interests between parties, must be followed by the federal courts in determining resultant tax liabilities — provided certain ground rules are followed. In essence those ground rules provide that the state court proceedings must not have been collusive — "collusive in the sense that all the parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional . . . tax." *Freuler v. Helvering*, 291 U.S. 35, 45 (1934). In view of the circumstances of this case — the nonadversary character of the proceedings before the *nisi prius* court, the failure of the court appointed examiner-master to make an independent inquiry of the Maryland law, and the failure of the court to do any more than rubber stamp the examiner-master's report — we find the decree of the Circuit Court of Baltimore City to have been collusive as that term is employed in *Freuler*. While the Third Circuit reads *Freuler* somewhat differently and apparently requires improper conduct to render proceedings in a *nisi prius* court collusive, *Gallagher v. Smith*, 223 F. 2d 218 (3 Cir. 1955), we feel our decision is in line with the better reasoned cases of other Circuits. See, *e.g.*, the recent cases of *Estate of Peyton v. Commissioner*, 323 F. 2d 438 (8 Cir. 1963), and *Estate of Faulkerson v. United States*, 301 F. 2d 231 (7 Cir.), *cert. denied*, 371 U.S. 887 (1962). Not to the contrary is our decision of *Pitts v. Hamrick*, 228 F. 2d 486, 490 (4 Cir. 1955), where the decision of a South Carolina *nisi prius* court was accepted "as evidencing the law of the state . . ." in a situation where there was "no showing that it was entered into as a result of fraud or in a nonadversary proceeding." Counsel for the estate lay particular stress on *Blair v. Commissioner*, 300 U.S. 5 (1937), where the Supreme Court accepted as binding an Illinois intermediate appellate court decision as to the validity of income assignments under Illinois law. Our holding today is not at odds with the case for two reasons. First of all the appellate court had "reviewed the decisions of the

Supreme Court of the state and [had] reached a deliberate conclusion." Second, the appellate court decision, unlike the decree of the Circuit Court of Baltimore City, had the effect of *stare decisis*.

The question remains, however, did the Tax Court, after properly declining to treat the decree of the Circuit Court of Baltimore City as dispositive of the property rights involved correctly interpret the applicable Maryland law in determining that Lallah could not appoint to her estate? Again, we must conclude that it did. Its decision was in accord with our own decision in *Leser v. Burnet*, 46 F. 2d 756 (4 Cir. 1931). At issue there was whether property passing under execution of a power of appointment to "such person or persons as [the decedent] by her last will and testament . . . shall have named" was to be considered as property passing under a general or special power for purposes of the Internal Revenue Act of 1921. If it passed under a general power, the property was taxable to decedent's estate; if under a special power it was not. We reviewed the Maryland cases and concluded that the property passed under a special power and incurred no tax liability. This was true because under our interpretation of the Maryland decisions these words did not vest in the decedent the power to appoint to her estate and, therefore, an otherwise general power of appointment was under Maryland law to be deemed a special power for purposes of assessing tax liability. Subsequently the Tax Court, sitting *en banc*, reached the same conclusion in a case involving the exact issue presented today. *Estate of William C. Allen*, 29 T.C. 465 (1957). The estate argues, however, that both decisions were incorrect, that they incorrectly relied on *dicta* in various Maryland Court of Appeals cases and that they ignored the only case directly in point, *Wyeth v. Safe Deposit & Trust Co. of Baltimore*, 176 Md. 369, 4 A. 2d 753 (1939).

We concede that the crucial question of whether an unlimited testamentary power of appointment gives the holder power to appoint to his estate has never been directly passed on by the Maryland Court of Appeals in a factual setting

similar to this case. Nevertheless, the question has been discussed in numerous decisions and, except in one circumstance, the invariable conclusion has been that it does not. In *Balls v. Dampman*, 69 Md. 390, 16 A. 16 (1888), the creditor of a decedent possessed of a similarly worded power sought to have real property of the donee's estate subject to that power sold in satisfaction of the debt. The lower court denied that relief and the Court of Appeals affirmed, holding that the decedent had evinced no intention in her will to appoint the property in satisfaction of the debt. The court went on to point out:

> "There is another and an equally serious difficulty across the appellant's path. Mrs. Balls had, under her husband's will, only the power to appoint, that is, to name by will, the person or persons to whom the property should go; and she had no authority to devise it for payment of her debts, that is, to encumber or consume it altogether, for her own use. The construction insisted on would, if adopted, practically convert her from a mere life tenant into an owner of the fee. She had no right to bind this property for the payment of her debts, or to fasten those debts upon it; and had such an intention on her part been expressly stated in her will, it could not have been given effect, because not within the scope of her power of appointment. Much less, then, can such a result be constructively and inferentially reached. It is manifest, therefore, that this first clause cannot, upon any principle, be given the effect contended for." 16 A. at 18.

The basic reasoning of the court that the holder of a so-called general power of appointment, absent specific enabling language, may not divert property subject to the power to his own use has been reaffirmed in subsequent cases, although in none was the point required for decision. See *Lamkin v. Safe Deposit & Trust Co. of Baltimore*, 192 Md. 472, 64 A. 2d 704 (1949); *Connor v. O'Hara*, 188 Md. 527, 53 A. 2d 33 (1947); *Mercantile Trust Co. v. Bergdorf & Goodman Co.*, 167 Md. 158, 173 A. 31 (1934); *Pope v. Safe Deposit & Trust Co. of Baltimore*, 163 Md. 239, 161 A. 404

(1932); *Prince de Bearn v. Winans*, 111 Md. 434, 74 A. 626 (1909); *Price v. Cherbonnier*, 103 Md. 107, 63 A. 209 (1906). There has been a retreat from this doctine where the donor and donee are one and the same person. *Wyeth v. Safe Deposit & Trust Co. of Baltimore*, 176 Md. 369, 4 A. 2d 753 (1939). This holding was contrary to the language contained in *Mercantile Trust Co. v. Bergdorf & Goodman Co.*, *supra*, and *Pope v. Safe Deposit & Trust Co. of Baltimore*, *supra*, but upon reflection, it will be seen that it was not at odds with the basic rationale of *Balls v. Dampman*, *supra*. As the court pointed out:

> "[T]he donor and the donee of the power being the same person, the intention of one is necessarily the intention of the other. . . . [T]he rule excluding one's creditors from appointment was apparently adopted to prevent frustration of the donor's intent. . . ." 4 A. 2d at 756.

Balls v. Dampman, *supra*, has been cited and approved in cases subsequent to *Wyeth* and must be deemed still viable. *Lamkin v. Safe Deposit & Trust Co. of Baltimore*, *supra*, and *Connor v. O'Hara*, *supra*. We must conclude, therefore that *Leser v. Burnet*, 46 F. 2d 756 (4 Cir. 1931), is not at variance with the way the Maryland Court of Appeals would decide the issue were it called upon for a specific holding[2] and is controlling on the question we face here.

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[2] The court was not required to pass on the validity of *Leser v. Burnet*, 46 F. 2d 756 (4 Cir. 1931), in *Connor v. O'Hara*, 188 Md. 527, 53 A. 2d 33 (1947), and so indicated. The court, earlier in the same opinion, however, had stated that: "Decisions or dicta of this court indicate that a donee has no power (unless expressly conferred) to appoint in payment of his own debts." 53 A. 2d at 34-35. *Leser v. Burnet*, *supra*, has been considered as representing a valid expression of Maryland law by the consensus of commentators. See, e.g., Moser, *Some Aspects of Powers of Appointment in Maryland*, 12 MD. L. REV. 13 (1951); Gold, *The Classification of Some Powers of Appointment*, 40 MICH. L. REV. 337 (1942); *The Meaning of the "General" Power of Appointment under Federal Estate Tax*, 1 MD. L. REV. 300 (1937).

Finally, we consider the estate's argument that by our holding today we frustrate Pierpont's clearly established dispositive intent. That he had an intention to take advantage of the marital deduction is doubtlessly clear; that he entertained the intention to give his widow the power to appoint to her estate is, at best, disputable. But even if Pierpont intended that Lallah might appoint to her estate, he failed to employ the necessary language which would have enabled her to do so under Maryland law. As recently observed by the Supreme Court: "The achievement of the purposes of the marital deduction is dependent to a degree upon the careful drafting of wills." *Jackson v. United States*, 32 U.S.L. Week 4222 (U.S. March 23, 1964). Maryland courts have fashioned a rather strange animal of the general power of appointment where the donor and donee are separate entities and where the donee has not been given the specific power to appoint to his own use. While calling this power a general power of appointment, it is a creature apart from the general power of appointment found in the other states. Nonetheless, entertaining proper respect for the law of Maryland as announced by its highest court, we must conclude, with that court, that "whether or not this is the kind of will which [decedent] ought to have made, we are not at liberty to rewrite it for him or to determine what he ought to have done." *Gaither v. Fidelity-Baltimore Nat'l Bank & Trust Co.*, 208 Md. 8, 115 A. 2d 711, 713 (1955).[3]

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[3] As put by Professor Simes:

"What are the outside limits of construction? If the court can give a meaning to a testator's will which he never thought of, what is to prevent the court from writing a new will for him? Where should the court stop? Without doubt, there are very definite limits to the process of judicial construction. Generally, courts give lip service to the proposition that they cannot make a will for the testator. And while, of course, they are in fact doing precisely what they profess not to do, when they follow the process of construction herein outlined, they are restrained in that process by the necessity of finding the construction from the language of the instrument itself. The court will not add a page, or even a paragraph, to the will under the guise of construction. The fiction that the construction comes from the words of the testator in the will must be preserved." SIMES, FUTURE INTERESTS §78 (1951).

The decision of the Tax Court is therefore

Affirmed.

ALBERT V. BRYAN, Circuit Judge, dissenting:

Actually, denial of the marital exemption by the Tax Court — and the tax assessment of $31,697.63 — rests upon the mere omission of the word "estate" from the clauses in the will creating the power of appointment. Neither the tax statute nor the Maryland decisions are so exacting in their requirements of a power to appoint to the donee's estate. No more is demanded than that the right be expressed. In my judgment the will contains the requisite expression.

The just and scrupulously objective statement of the facts in the opinion of the Court demonstrates the point of my disagreement. In forceful articulation the will — even down to plagiarizing the very phraseology of the Tax Code — manifests that the pertinent marital deduction provisions of the statute were adopted, embraced and incorporated in their entirety. Obviously this includes a power of appointment, such as is contemplated by the statute, with every requisite element. The possible beneficiaries are unlimited — thus necessarily including the donee's estate — by the will's directions that the trust principal be paid over "in such manner and proportions as my wife *may* designate and appoint". A more encompassing choice of appointees is not easily phrased. To say that, nevertheless, the testament's power fails to comply — because it did not refer to "estate" eo nominee — is for me a captious and pharisaical reading of the ultimate bequest or devise.

Besides, the decision of the Circuit Court of Baltimore City was not collusive in the sense that it was ex parte or by consent. It was non-adversary but only so because the testator's son and daughter-in-law, both defendants, did not oppose the executor's construction, although a contrary determination would have advantaged them. Their failure to advance their position ought not to convert the suit into a "no-contest". Hence under Freuler v.

Helvering, 291 U.S. 35, 45 (1934), the interpretation of the State court bound the Tax Court.

But in my judgment neither this decree nor the testimony dehors the will emphasizing the testator's aim need be considered. The testament itself plainly provides the donee with the power to name her estate as appointee. The Court of Appeals of Maryland, as the majority now fully points out, has several times passed upon the scope to be accorded a power of appointment. Never, however, has it excluded the estate of the donee as a potential nominee when the organic document clearly permits the estate to be a beneficiary.

In my view the Tax Court has been overcritical and puristic in collection of the sovereign's death tallage. I would reverse.

Judgment

(Filed and Entered September 4, 1964)

United States Court of Appeals

For the Fourth Circuit

No. 9398.

Estate of Mervin G. Pierpont, Deceased,
Union Trust Company of Maryland and
Ernest L. Poyner, Executors,
Petitioners,

vs.

Commissioner of Internal Revenue,
Respondent.

On Petition to Review the Decision of the Tax Court of the United States.

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the decision of the said Tax Court of the United States, in this cause, be, and the same is hereby, *affirmed*.

J. SPENCER BELL,
United States Circuit Judge,

ROBERT W. HEMPHILL,
United States District Judge.

I dissent:

ALBERT V. BRYAN,
United States Circuit Judge.

Filed Sept. 4, 1964.

MAURICE S. DEAN,
Clerk.